Public Prosecutor v Kanapathy a/l Kupusamy & Anor

HIGH COURT (KUALA LUMPUR) — CRIMINAL TRIAL NO 45–5 OF 2000
NIK HASHIM J
20 OCTOBER 2000

Evidence *— Information leading to fact discovered — Conduct leading to room where drugs were found, whether amount to 'statement' within s 37A Evidence Act 1950 — Whether conduct was answer to question by police officer — Whether conduct amount to information given by accused before discovery of drugs — Whether caution must be administered — Evidence Act 1950 ss 27 & 37A*

The two accused persons (OKT1 and OKT2) were charged jointly for an offence of trafficking in dangerous drugs. The case for the prosecution was that OKT1 was asked a specific question by SP3 whether he kept any offending item whereupon he did not reply to the question. Instead he led the police party to a room where the drugs were recovered. Whereas the case against OKT2 was that he was found alone in the room and appeared frightened when the drugs were recovered. The prosecution relied on ss 8(2) and 27 of the Evidence Act 1950 as well as s 34 of the Penal Code to prove its case against both the accused. Counsel for OKT1 submitted that there was no evidence against OKT1. It was submitted the conduct of OKT1, ie leading the police to the room and retrieving the drugs underneath the mattress and handed it over to SP3, amounts to an answer to the question and hence a statement as envisaged under s 37A of the Act. As such the conduct of OKT1 was inadmissible due to failure on the part of the prosecution to properly show that the caution was rightly administered to him that he understood the caution.

Held, acquitting and discharging both accused:

(1) Since the word 'statement' in s 37A has not been defined, the dictionary meaning of 'something that is stated' should be given to it. To hold that the conduct of OKT1 in this case amounted to a statement under s 37A would be to overstretch the language beyond its common usage. Therefore the court found that OKT1's conduct in leading the police and retrieving the drugs in the room was not an answer to the question and hence it was not a statement under s 37A. Since OKT1 did not make any statement in answer to the question, a trial within a trial to determine the admissibility of OKT1's conduct was therefore unnecessary. Thus, the question of whether the caution was rightly administered or not did not arise (see p 27C–F).

(2) For evidence to be admissible under s 27 of the Evidence Act 1950, there must first be evidence of information given by an accused in custody and that information must be given before the discovery of the fact. In the present case, there was no evidence of information given by OKT1 leading to the discovery of the drugs.

The question asked by SP3 was specific, there was no specific evidence on record that OKT1 understood that question (see pp 28C, 29C-D).

(3) The mere action on the part of OKT1 in leading the police and retrieving the drugs without prior act of informing or telling SP3 in response to her question was ambiguous and insufficient to constitute information or as a means of imparting knowledge as envisaged under s 27 of the Evidence Act. Accordingly, the discovery of the drugs was not due to the knowledge derived by SP3 informed by OKT1 (see p 29F–G).

(4) Though OKT1's conduct was admissible under s 8(2) of the Evidence Act, such conduct did not pin him down to anything incriminating beyond the fact that he knew of the existence of the drugs. Accordingly it was not possible to say whether OKT1 merely had knowledge of the drugs or that he had actually hidden the drugs underneath the mattress. Thus it was not safe to conclude that OKT1 had the knowledge and custody and control of the drugs. In the absence of clear and definitive evidence of custody or control and knowledge of the drugs, the prosecution had failed to prove affirmatively that OKT1 had possession of the drugs (see pp 30I–31A, C).

(5) With regard to the evidence against OKT2, there was absolutely no evidence that OKT2 had exclusive possession, custody or control and knowledge of the drugs. Without such evidence, the prosecution had failed to prove possession of the drugs by OKT2. Further the prosecution had failed to establish that OKT2 had the care and management or exclusive occupation of the room and therefore he could not be deemed to be the occupier thereof. That being the case, the presumption that the drugs were so concealed with the knowledge of OKT2 as the occupier of the room under s 37(g) of the Act could not apply against him (see p 31E, H).

[**Bahasa Malaysia summary**

Dua orang tertuduh (OKT1 dan OKT2) didakwa bersama-sama bagi satu kesalahan mengedar dadah berbahaya. Kes pendakwaan adalah bahawa OKT1 telah ditanya satu soalan spesifik oleh SP3 samada beliau mempunyai apa-apa barang yang menyalahi undang-undang di mana beliau tidak menjawab soalan tersebut. Sebaliknya, beliau membawa pihak polis ke sebuah bilik di mana dadah dijumpai. Kes OKT2 adalah bahawa beliau dijumpai seorang diri di dalam bilik tersebut dan kelihatan takut apabila dadah tersebut dijumpai. Pendakwaan menggunakan s 8(2) dan 27 Akta Keterangan 1950 dan juga s 34 Kanun Keseksaan untuk membuktikan kesnya terhadap kedua-dua orang tertuduh. Peguam OKT1 berhujah bahawa tidak terdapat keterangan terhadap OKT1. Ia dikatakan bahawa kelakuan

OKT1, iaitu membawa anggota polis ke bilik tersebut, mengeluarkan dadah dari bawah tilam dan memberikannya kepada SP3, merupakan satu jawapan kepada soalan tersebut dan merupakan kenyataan di bawah s 37A Akta tersebut. Oleh yang demikian, kelakuan OKT1 tidak boleh diterima kerana pihak pendakwaan gagal menunjukkan bahawa amaran telah disampaikan kepadanya dengan cara yang betul dan bahawa dia memahami amaran tersebut.

Diputuskan, kedua-dua orang tertuduh dibebaskan dan dilepaskan:

(1) Oleh kerana perkataan 'kenyataan' dalam s 37A tidak didefinasikan, maksud 'sesuatu yang dinyatakan' patut diberikan kepadanya. Mengatakan bahawa kelakuan OKT1 dalam kes ini merupakan kenyataan di bawah s 37A akan memutarbelitkan bahasa tersebut melampaui penggunaan hariannya. Oleh itu, mahkamah mendapati bahawa kelakuan OKT1 dalam membawa anggota polis dan mengeluarkan dadah dari bilik bukanlah satu jawapan kepada soalan maka ia bukanlah satu kenyataan di bawah s 37A. Oleh kerana OKT1 tidak membuat apa-apa kenyataan terhadap soalan tersebut, perbicaraan dalam perbicaraan bagi memastikan kebolehterimaan kelakuan OKT1 tidak diperlukan. Dengan ini, persoalan samada amaran tersebut disampaikan dengan betul tidak muncul (lihat ms 27C–F).

(2) Untuk membolehkan keterangan diterima di bawah s 27 Akta Keterangan 1950, keterangan mengenai maklumat yang diberikan oleh seseorang tertuduh dalam jagaan diperlukan dan maklumat tersebut mestilah disampaikan sebelum fakta didapati. Dalam kes ini, tidak terdapat keterangan mengenai maklumat yang diberikan oleh OKT1 yang memberikan petunjuk kepada penemuan dadah tersebut. Soalan yang ditanyakan oleh SP3 merupakan soalan yang khusus, tetapi tidak terdapatnya keterangan yang khusus dalam rekod bahawa OKT1 memahami soalan tersebut (lihat ms 28C, 29C–D).

(3) Tindakan semata-mata OKT1 dalam membawa anggota polis dan mendapatkan dadah tanpa memaklumkan atau memberitahu SP3 terlebih dahulu atau membalas soalannya kabur dan tidak dapat membentuk maklumat atau kaedah menyamapaikan ilmu yang difahami di bawah s 27 Akta Keteerangan. Berikutan itu, penemuan dadah tersebut bukanlah disebabkan pengetahuan yang diperolehi SP3 dari OKT1 (lihat ms 29F–G).

(4) Walaupun kelakuan OKT1 boleh diterima di bawah s 8(2) Akta Keterangan, kelakuan tersebut tidak akan mengaitkannya dengan apa-apa yang menunjukkan bahawa dia bersalah selain daripada fakta bahawa dia tahu mengenai kewujudan dadah tersebut. Disebabkan ini, sukar menentukan sama ada OKT1 cuma tahu mengenai dadah tersebut atau dialah yang menyembunyikan dadah tersebut di bawah tilam. Oleh itu, ia tidak selamat membuat kesimpulan bahawa OKT1 mempunyai pengetahuan,

jagaan dan kawalan terhadap dadah tersebut. Disebabkan ketiadaan keterangan yang jelas dan pasti mengenai jagaan, kawalan dan pengetahuan tersebut, pihak pendakwaan gagal membuktikan secara pasti bahawa OKT1 mempunyai dadah tersebut (lihat ms 30I–31A, C).

(5) Dalam hal keterangan terhadap OKT2, terdapat tiada keterangan langsung yang OKT2 mempunyai kepunyaaan, jagaan, kawalan atau pengetahuan eksklusif mengenai dadah tersebut. Tanpa keterangan sedemikian, pihak pendakwaan gagal membuktikan kepunyaan dadah tersebut oleh OKT2. Selain itu, pendakwaan gagal membuktikan bahawa OKT2 mempunyai jagaan, urusan atau penghunian eksklusif bilik tersebut dan oleh itu tidak boleh digelar penghuni bilik tersebut. Oleh itu, anggapanbahawa dadah tersebut disembunyikan dengan pengetahuan OKT2 sebagai penghuni bilik tersebut di bawah s 37(g) Akta tersebut tidak boleh digunakan terhadapnya (lihat ms 31E, H).]

Notes

For cases on information leading to fact discovered, see 7 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1407–1439.

Cases referred to

Abdul Hamid bin Udin v PP [2000] 6 MLJ 334 (refd)
Choo Chang Teik & Anor v PP [1991] 3 MLJ 423 (refd)
Choo Yoke Choy v PP [1992] 2 MLJ 632 (refd)
Lim Kah Wan v PP [1985] 2 CLJ 473 (refd)
Muhammed bin Hassan v PP [1998] 2 MLJ 273 (refd)
PP v Basri bin Salihin [1994] 2 MLJ 476 (refd)
PP v Khoo Boo Hock & Anor [1990] 1 CLJ 971 (refd)
PP v Paneerselvan & Ors [1991] 1 MLJ 106 (refd)
Tai Chai Keh v PP [1948-49] MLJ Supp 105 (refd)
PP v Tai Mei Yuen [1990] 1 CLJ 1208 (refd)
PP v Toh Ah Keat [1977] 2 MLJ 87 (refd)
R v Abbott [1955] 2 All ER 899 (refd)
Wai Chan Leong v PP [1989] 3 MLJ 356 (refd)

Legislation referred to

Criminal Procedure Code (Act 593) s 113
Evidence Act 1950 ss 8(2), 27, (1)
Dangerous Drugs Act 1952 ss 12(2), 37(g), 37A, (1)(b), (3), 39A(2), 39B(1)(a), (2)
Penal Code s 34

Jagjit Singh (*Azizan bin Abdullah* with him) (Attorney General's Chambers) for the Public Prosecutor.

Gobind Singh Deo (*Karpal Singh* with him) (*Karpal Singh & Co*) for the first accused.

Kamarul Hisham (*Daim & Gamany*) for the second accused.

Nik Hashim J:

The charge

In this drug trafficking case, the two accused persons, Kanapathy a/l Kupusamy (OKT1) and Nagarajan a/l Subramaniam (OKT2) were jointly charged on 24 May 1999 at about 12 pm in a room at shop house, No 162 Jalan Pudu Kuala Lumpur, did traffick in dangerous drugs to wit, 52g mixture of heroin (34.9g) and monoacetylmorphines (17.1g), an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and punishable under s 39B(2) of the same Act read with s 34 of the Penal Code ('PC').

The prosecution's case

Acting on information, a police party led by Inspector Haslah bte Bachok (SP3) of Jabatan Narkotik, IPK, Kuala Lumpur, arrested OKT1 beside his car at Jalan Pudu, Kuala Lumpur. After identifying herself as a police officer, SP3 read out to OKT1 the caution under s 37A(1)(b) of the Act and had it translated into Tamil by L/Kpl Ali Ahmad (SP6). SP3 then questioned OKT1 whether he had any offending items in the car. OKT1 remained silent. SP3 ordered her men to search the car, and they found nothing incriminating inside the car. SP3 asked OKT1:

> Adakah kamu simpan apa-apa barang salah dalam simpanan kamu?

OKT1 then led the police to a shop house, No 162 ('the premise'), which was about 20m away from the car.

The premises was a double storey building belonging to Pavillion Entertainment Centre Sdn Bhd. According to the company secretary (SP4), the premises was not rented out to any person. It was left vacant since the company bought it on 12 March 1998 for redevelopment purposes.

OKT1 brought SP3 and her men to a room No 2 on the first floor of the premises. Before entering the room, SP3 knocked on the door. The door was opened by OKT2. Inside the room, SP2 questioned OKT1 again whether there was any offending item in the room. Learned counsel for OKT1 objected to OKT1's answer from being given by SP3 contending that the OKT1's answer was not given voluntarily and urged the Court to hold a trial within a trial to determine its admissibility. On hearing the learned deputy public prosecutor's reply that he would not be adducing any of OKT1's answers to SP3's question, I therefore held that a trial within a trial was not necessary for reasons which I would discuss later. Hence, I overruled the objection and ordered the main trial to proceed.

Whilst in the room, SP3 saw OKT1 pick up a newspaper package underneath a mattress on a wooden pangking (a form of bedstead) and handed it over to SP3. In the presence of OKT1 and OKT2, SP3 opened the package and found a plastic packet (P15) containing yellowish granular

and powdery substance suspected to be heroin. On further search of the room, SP6 found a reddish plastic package (P16) below the pangking and he took it and handed it over to SP3. On opening the package, SP3 found six big plastic packets (P17(A-F)) and 30 small plastic packets (P18(1-30)) containing yellowish granular and powdery substance, also suspected to be heroin. A sealer, model K F200H (P21), was also found in the room. SP3 then ordered OKT1 and OKT2 to be arrested and the exhibits confiscated. They were brought to the Jabatan Narkotik, IPK, Kuala Lumpur, where a police report vide Tun HS Lee Report No 14133/99 (p11) was lodged.

The 37 packets containing the yellowish granular and powdery substance were sent to the government chemist and on analysis, the chemist (SP9) certified in his report (P27), a copy of which was served on each OKT1 and OKT2, that the 37 packets submitted contained a total of 842.9g of yellowish substance which contained a total of 52.0g mixture of heroin (34.9g) and monoacetylmorphines (17.1g). Heroin and monoacetylmorphines are dangerous drugs which are listed under the First Schedule to the Act .

In a nutshell, the case for the prosecution is that OKT1 was asked a specific question by SP3 whether he kept any offending item, whereupon he did not reply to the question. Instead, he led the police party to a room in the premises where the drugs were recovered. Whereas the case against OKT2 is that he was found alone in the room and appeared frightened when the drugs and the sealer were recovered. The prosecution, led by learned deputy public prosecutor, En Jagjit Singh, relied on s 8(2) and s 27 of the Evidence Act 1950 ('EA'), as well as s 34 of the PC to prove its case against both the accused.

The defence's contentions

At the end of the prosecution case, learned counsel for OKT1, En Gobind Singh Deo, submitted that there was no evidence against OKT1. According to him, the conduct of OKT1, ie leading the police to the room and retrieving the drugs underneath the mattress and handing it over to SP3, amounts to an answer to the question and hence a statement as envisaged under s 37A of the Act. As such, the conduct of OKT1 is inadmissible due to failure on the part of the prosecution to properly show that the caution was rightly administered to him that he understood the caution.

Whether conduct amounts to statement

Section 37A of the Act states:

> (1) Where any person is charged with any offence against this Act any statement, whether such statement amounts to a confession or not or *is oral* or *in writing*, made at any time, whether before or after such person is charged and whether in the course of a police investigation or not and whether or not wholly or partly *in answer to questions*, by such person to or *in the hearing* of any police officer of or above the rank of Inspector or any senior officer of customs and whether or not *interpreted* to him by any

other police officer or senior officer of customs or any other person concerned or not in the arrest, shall notwithstanding anything to the contrary contained in any written law, be admissible at his trial in evidence and, if such person tenders himself as a witness, any such statement may be used in cross-examination and for the purpose of impeaching his credit:

Provided that no such statement shall be admissible or used as aforesaid —

(a) if the making of the statement appears to the Court to have been caused by any inducement, threat or promise having reference to the charge against such person, proceeding from a person in authority and sufficient in the opinion of the Court to give such person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceeding against him; or

(b) in the case of a statement made by such person after his arrest, unless the Court is satisfied that a caution was administered to him in the following words or words to the like effect —

It is my duty to warn you that you are not obliged to say *anything or* to answer *any question, but anything* you say, *whether* in answer to a question *or not, may be given in evidence:*

Provided that a statement made by any person before there is time to caution him shall not be rendered inadmissible in evidence merely by reason of no such caution having been given if it has been given as soon as possible.

(2) Notwithstanding any thing to the contrary contained in any written law a person accused of an offence to which subsection (1) applies *shall not be bound to answer any questions* relating to such case after any such caution as aforesaid has been administered to him.

(3) Where a statement is purported to be made by a person charged with an offence against this Act under and in accordance with section 113 of the Criminal Procedure Code, the statement so made shall be deemed to have been made under and in accordance with this section. (Emphasis added.)

Apart from the provision of sub-s 3 above, the rest of the provisions of s 37A is in pari materia with the provision in s 113 of the Criminal Procedure Code (Act 593) ('the CPC'). Perhaps it is due to this similarity in both provisions that sub-s 3 of s 37A of the Act provides specifically that a statement made under s 113 of the CPC shall be deemed to have been made under s 37A of the Act.

It is to be noted that s 113 of the CPC in the present form came into force on 10 January 1976 vide Act A324.

However, the word 'statement' in s 37A of the Act and s 113 of the CPC has not been defined.

In *Lim Kah Wan v PP* [1985] 2 CLJ 473, the appellant who had not been cautioned said: 'Don't waste your time' and nodded with head towards the front passenger seat of his car saying, at the same time, 'That's the stuff'. Edgar Joseph Jr J (as he then was) said at p 480:

26 What the appellant said just before he nodded his head, namely 'Don't waste your time' and immediately after, 'That's the stuff' were all so inextricably interwoven that both verbal statements and the action of nodding had to be admitted in order to understand what the appellant had intended to convey.

27 The appellant's action of nodding was part of his statement; see *Lee Lian & Ors v PP* [1956] MLJ 191, where Thomson J (as he then was) held that 'Statements must be construed as including actions such as pointing out a person at an identification parade' and *PP v Siew Sung* [1966] 1 MLJ 145, where HT Ong Ag CJ (as he then was) held that even opening of a pin-table machine with a key by an accused at a police station amounted to the making of a statement.

On my part, since the word 'statement' in ss 37A of the Act and s 113 of the CPC has not been defined, I feel the dictionary meaning of 'something that is stated' should be given to it (see *Sarkar on Evidence* (15th Ed, 1999) at p 2279; *PP v Paneerselvan & Ors* [1991] 1 MLJ 106 at p 107). The usage of the words such as 'is oral or in writing', 'in answer to questions', 'in the hearing of', 'interpreted', 'to say' 'to answer', 'you say' and 'shall not be bound to answer any question' in s 37A as emphasized above, clearly indicate that the word 'statement' therein is confined to something that is stated orally or in writing. To hold that the conduct of OKT1 in this case amounts to a statement under s 37A would be, in my view, to overstretch the language beyond its common usage. Therefore, I hold that OKT1's conduct in leading the police and retrieving the drugs in the room is not an answer to the question and hence it is not a statement under s 37A of the Act or under s 113 of the CPC.

Since OKT1 did not make any statement, be it oral or in writing, in answer to the question, I ruled that a trial within a trial to determine the admissibility of OKT1's conduct was therefore unnecessary. Thus, the question of whether the caution was rightly administered or not does not arise.

On the facts, the present case is readily distinguishable from *Lim Kah Wan*, *Lee Lian* and *Siew Sung* and they are thus not applicable to this case.

In *Lim Kah Wan*, the learned judge there was considering the nodding of the head as so inextricably interwoven with his verbal statements that the action of nodding must be considered as part of his statement as information leading to discovery under s 27 of the EA. Unlike in that case, OKT1 here did not make any verbal statement at all in answer to the question.

With regard to *Lee Lian* and *Siew Sung*, it is pertinent to note that these are two cases which were decided under the old s 113 of the CPC (Cap 6) which debarred any statement made by any person to a police officer in the course of a police investigation, to be used as evidence. There was no provision of the words such as 'in oral or in writing' to describe the 'statement' under the old s 113 of the CPC. Hence, I think, the wider interpretation of the word 'statement' in the two cases. The 'statement' in the present s 113 of the CPC which is equivalent to s 37A of the Act however, is self-explanatory in that its application, in my view, is restricted

only to oral or written statements. Thus, En Gobind Singh Deo's submission for the wider interpretation of OKT1's conduct in response to the question amounting to a statement under s 37A of the Act, is not justified and therefore, it cannot be accepted. The Act is highly penal in nature and as such, its provisions must be construed strictly.

Section 27 of the Evidence Act 1950

Now, s 27(1) of the Evidence Act 1950 states:

> When any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of that information, whether the information amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved.

It is clear from authorities that for evidence to be admissible under s 27 of the EA 1950, there must first be evidence of information given by an accused in custody and that information must be given before the discovery of the fact (see *PP v Basri bin Salihin* [1994] 2 MLJ 476) and such information must relate to the fact discovered. To constitute 'information' under the section, the information must come from the accused and nobody else. The information must be the accused's own statement in his own language (see *Sarkar on Evidence* (15th Ed, 1999) at pp 550, 551).

In *PP v Toh Ah Keat* [1977] 2 MLJ 87, Hashim Yeop A Sani (as he then was) at p 89 said:

> Section 27 of the Evidence Act however deals with c very special type of statement which even if self-incriminatory is nonetheless admissible under that section provided that the *conditions prescribed are strictly complied with*. (Emphasis added).

In *Wai Chan Leong v PP* [1989] 3 MLJ 356 (SC), Gunn Chit Tuan SCJ said (at p 358) that:

> [It] must be borne in mind that for s 27 of the Evidence Act to apply, the information must be such as has caused the discovery of a fact. In other words the fact must be the consequence and the information the cause of its discovery. Moreover the information must relate distinctly to the fact discovered … .

Further down, he continued:

> It must also be observed that the legislature has used the expression 'information' in s 27 of the Evidence Act and therefore did not intend it to have the same meaning as a statement. Although that expression is not defined in the Evidence Act, unlike a statement, *it includes knowledge derived by the person informed by the accused as well as the means taken to impart that knowledge.* (Emphasis added.)

In *PP v Khoo Boo Hock & Anor* [1990] 1 CLJ 971, Edgar Joseph Jr J (as he then was) held:

> (1) The prosecution must prove beyond reasonable doubt that the actual questions put to the accused in order to find out precisely what

information was intended to be conveyed by the accused, which led to the discovery of the drugs.

(2) A contemporary record of what really passed between the police and accused was of particular importance.

And in *PP v Tai Mei Yuen* [1990] 1 CLJ 1208, the same learned judge held:

(1) It is trite law that although there is no legal requirement that statement under s 27 of the Evidence Act must be taken down in writing, prudence demands that this is highly desirable.

Whether conduct amounts to information

Applying the above principles of law governing s 27 of the EA 1950 to the facts of this case, I hold that there is no evidence of information given by OKT1 leading to the discovery of the drugs underneath the mattress in the room in the present case. Though the question asked by SP3 'Adakah kamu simpan apa-apa barang salah dalam simpanan kamu' is specific, there is no specific evidence on record that OKT1 understood that question. It is to be noted that this question was not recorded by SP3 anywhere. SP6, who acted as an interpreter and was together with SP3, could not even remember any of the questions asked by SP3 to OKT1. Without it being proved clearly and exactly that OKT1 understood the question, whether by interpretation or not, it is not possible to infer what precisely was the information intended to be conveyed by OKT1's action. OKT1 could not be presumed to have understood the question. If the prosecution considered s 37A(1)(b) caution necessary to have it interpreted into Tamil to OKT1 by SP6, then I see no reason why such an important question to the prosecution was not similarly interpreted to OKT1. Thus, in my opinion, the mere action on the part of OKT1 in leading the police and retrieving the drugs underneath the mattress in the room without prior act of informing or telling SP3 by OKT1 in response to her question, ie whether he kept any offending items, is ambiguous and insufficient to constitute information or as a means of imparting knowledge as envisaged under s 27 of the EA 1950. Accordingly, I find that the discovery of the drugs underneath the mattress in the room is not due to the knowledge derived by SP3, who was informed by OKT1. In other words, the discovery of the drugs underneath the mattress was not in consequence of the information received from OKT1.

But in the recent case of *Abdul Hamid bin Udin v PP* [2000] 6 MLJ 334, an almost identical question was asked in that case. The appellant was charged under s 12(2) of the Act for possession of 107.3g of cannabis punishable under s 39A(2) of the Act. At the time of arrest, the appellant was watching television with his brother and a neighbour. Upon being asked by SP4 whether he kept any prohibited items, the appellant took SP4 to his bedroom and showed SP4 a mattress, a pillow on that mattress and pointed underneath the pillow. Upon lifting the pillow, SP4 found an orange plastic bag containing cannabis. The appellant was found guilty as charged and was sentenced by the sessions court to six years' imprisonment and ten strokes of the rotan. The appellant appealed. In dismissing the appeal,

Abdul Wahab J, in one of his grounds for the dismissal of the appeal, at pp 349–350 said:

> The question by SP4 was: 'Adakah kamu menyimpan apa-apa barang salah'. The question was whether he, the appellant kept any prohibited items. His action in response shows that he admitted to being the person keeping the 'barang salah'. He showed SP4 where it was. Therefore he knew what it was. In other words, he had custody, control and knowledge of the cannabis in the orange bag. He therefore had the requisite guilty knowledge. This is clearly distinguishable from *PP v Khoo Boo Hock & Anor*. The accused was asked whether there were drugs on the premises. He proceeded to show where the drugs were in premises occupied by him and his wife. On the facts of that case, it was not possible to say whether they merely had knowledge of the presence of the offending exhibits under the floorboards of the storeroom, and so were merely assisting the police in their recovery by indicating someone else's guilt. The distinction is that in this case the appellant was asked the very specific question whether he kept any prohibited item, whereupon he proceeded to show SP4 where they were. It would be less clear if the question was whether there were any prohibited items on the premises, which question does not require that he had anything to do with the items.
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> In the context of the question, the subsequent leading of SP4 to the offending drug cannot be said to be merely assisting in their recovery as in *PP v Khoo Boo Hock & Anor*; *Yee Ya Mang v PP* [1972] 1 MLJ 120. It is evident that the appellant's conduct of showing the offending material, in reply to the question: 'Adakah kamu menyimpan apa-apa barang salah' shows that the appellant is keeping something that he knows is wrong in law, and that prohibited item was shown to be cannabis. Such evidence falls squarely within s 27 of the Evidence Act 1950...

In the instant case, there is no evidence whatsoever that the room where the drugs were recovered was occupied by OKT1. In that case however, SP6, the father of the appellant testified that the room was the room of the appellant. Unlike that case, the accused here are not Malays. Thus, in the absence of any incriminating statement made by OKT1 leading to the discovery of the drugs in the room, I, with great respect, am not prepared to subscribe to the view of the learned Judge in *Abdul Hamid bin Udin*, and apply it to this case as I am of the view that the OKT1's conduct of leading the police and retrieving the drugs after being posed the question, is ambiguous and insufficient to render such conduct as information admissible under s 27 of the EA 1950. Before the section can be applied, its conditions prescribed therein must be strictly complied with. In this case, the prosecution has failed to comply with its conditions.

Therefore, in the present case, in the absence of evidence of information, s 27 of the EA 1950 cannot assist the prosecution in its case against both the accused, OKT1 and OKT2.

Inference from conduct

Though OKT1's conduct of leading the police to the discovery of the drugs under the mattress in the room is admissible under s 8(2) of the EA 1950, and the SP3's question to OKT1 is relevant under explanation 2 to the

section, such conduct, to my mind, does not pin him down to anything incriminating beyond the fact that he knew of the existence of the drugs. Accordingly, it is not possible to say whether OKT1 merely had knowledge of the drugs or that he had actually hidden the drugs underneath the mattress (see *Choo Yoke Choy v PP* [1992] 2 MLJ 632. In view of this lurking doubt, it might be noteworthy to refer to *Tai Chai Keh v PP* [1948-49] MLJ Supp 105, in which Spenser Wilkinson J at p 108 held that:

> Where there is more than one inference which can reasonably be drawn from a set of facts in a criminal case, we are of the opinion that the inference most favourable to the accused should be adopted.

It is thus not safe to conclude that OKT1 had the knowledge and custody or control of the drugs. In the absence of clear and definite evidence of custody or control and knowledge of the drugs, the prosecution has failed to prove affirmatively that OKT1 had possession of the drugs underneath the mattress. (See *Muhammed bin Hassan v PP* [1998] 2 MLJ 273 (FC)). With regard to the drugs below the pangking, there is not a shred of evidence to connect OKT1 with the drugs.

Whether OKT2's presence in the room amounts to exclusive occupation thereof

With regard to the evidence against OKT2, I, with respect, agree entirely with En Kamarul Hisham, learned counsel for OKT2 that there is absolutely no evidence that OKT2 had exclusive possession, custody or control and knowledge of the drugs underneath the mattress and below the pangking in the room. Without such evidence, the 'prosecution has failed to prove possession of the drugs by OKT2. As to whether or not OKT2 could be said to have had the care and management or exclusive occupation of the room, the only evidence connecting OKT2 with the room is the fact that he was present inside the room when the drugs were discovered. SP4 testified that Pavillion Entertainment Sdn Bhd, as owners of the said premises never tenanted the premises to anyone nor gave anyone authority to care and manage the premises. There is no evidence that OKT2 in fact had any belongings in the said room. The room was not his. Both SP3 and Inspector Wan Roslan (SP7) testified that the said premises looked as if it had been abandoned, full of rubbish and various odds and ends that seem to have no owner. There is no positive evidence that the room could be locked from inside or outside the room. The size of the room was not even adduced. One of the doors to the premises was left unlocked. Moreover, access to the room and the premises by others was not excluded by the prosecution. In the end, I find that the prosecution has failed to establish that OKT2 had the care and management or exclusive occupation of the room and therefore he cannot be deemed to be the occupier thereof. That being the case, it has to follow that the presumption that the drugs were so concealed with the knowledge of OKT2 as the occupier of the room under s 37(g) of the Act cannot apply against him.

With regard to OKT2's appearance, I find that not much importance can be attached to the frightened look on OKT2's face at the time when the

drugs and the sealer were found in the room, for such an appearance is not necessarily the result of a guilty mind.

Section 34 of the Penal Code

On the matter of joint concert under s 34 of the PC, I find OKT1's action in leading the police and retrieving the drugs in the room in which OKT2 was present, is not evidence of common intention or evidence from which common intention can properly be inferred against them (see *Shamsuddin bin Hassan & Anor v PP* [1991] 3 MLJ 314 (SC)).

Conclusion

The prosecution in this case relies heavily on the evidence of inference against both the accused. In this regard, the caution stated by the Supreme Court in *Choo Chang Teik & Anor v PP* [1991] 3 MLJ 423 should be borne in mind. The Supreme Court said at p 425:

> … we feel that in offences involving capital punishment such as trafficking in drugs, evidence by inference alone is not sufficient to support a conviction of the appellant without some proof of the element of control.

The onus of proving a criminal charge against both the accused in a joint trial always lies with the prosecution. In *R v Abbott* [1955] 2 All ER 899, it was held that:

> If two people are jointly indicted for the commission of a crime and the evidence does not point to one rather than the other, and there is no evidence that they were acting in concert, the jury ought to return a verdict of not guilty against both because the prosecution have not proved the case.

Upon due consideration of the evidence led by the prosecution and the submissions of the respective learned counsel and deputy public prosecutor, I take the view that the prosecution has not made out a prima facie case upon which OKT1 and OKT2 should be called upon to answer the charge. Accordingly, both the accused, OKT1 and OKT2 are acquitted and discharged.

Accused acquitted and discharged.

Reported by Jafisah Jaafar